

## THE COLUMBIA RIVER COMPACT

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<sup>1</sup> The opinions expressed herein are solely those of the author, and are not necessarily shared by the Washington Attorney General's Office, the Oregon Department of Justice, the Washington or Oregon Departments of Fish and Wildlife, or any other person or entity.

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The Columbia River Compact is a Congressionally-ratified interstate agreement between Oregon and Washington. In the Columbia River Compact, the two states promised each other in 1915 to adopt or amend laws for the conservation of fish in the Columbia River where it forms their common boundary only with both states' mutual consent. The procedures for implementing the Columbia River Compact have evolved over time, and today they reflect a mix of statute, court order, policy, and custom. The Columbia River Compact has proven to be a durable agreement that continues to work well today as a framework for fisheries management in the Columbia River.

#### **A. Events Leading to the Adoption of the Columbia River Compact**

When Congress split Washington Territory from Oregon Territory in 1853, it provided that both Territories would have joint, or "concurrent," jurisdiction over offenses committed on the Columbia River where it formed their common boundary. Act of March 2, 1853, § 21, 10 Stat. 172, 179; Oregon Statehood Act of Feb. 14, 1859, § 2, 11 Stat. 383. The States of Washington and Oregon retain that concurrent jurisdiction today. *State v. Svenson*, 104 Wash.2d 533, 536, 707 P.2d 120, 121 (1985); *State v. Nearing*, 99 Or.App. 724, 784 P.2d 121 (drunk driving on I-201 bridge), *review denied*, 309 Or. 698, 790 P.2d 1141 (1990). The general rule is that each state can always enforce its laws on its side of the river, but it can enforce its laws on the other state's side only if that state has a substantially similar law. *E.g., Nielsen v. Oregon*, 212 U.S. 315 (1909); *State v. Catholic*, 75 Or. 367, 383, 147 P. 372, 377 (1915) (Oregon fishing license law enforceable because both states made it unlawful to fish without a license, though license requirements were not identical). The state boundary is the mid-channel of the river. *See* Wash. Rev. Code ch. 43.58; Or. Rev. Stat. §§ 186.510 - .520; Pub. L. No. 83-575, 72 Stat. 455 (1958) (Oregon-Washington Columbia River Boundary Compact).

With the emergence of the canning industry in the 1860s, commercial fishing exploded in the Columbia River. The relatively pristine Columbia River Basin supported huge runs of salmon. Entrepreneurs set up canneries, fish traps, and fish wheels in the Columbia River where it forms the boundary between Washington and Oregon, catching and canning enormous quantities of fish. By the turn of the twentieth century, the runs were already declining. *See United States v. Winans*, 198 U.S. 371, 372 (1905) (describing brief of the United States); Courtland L. Smith, *SALMON FISHERS OF THE COLUMBIA* ch. 3 (Oregon State University Press 1979).

The legislatures of Oregon and Washington began enacting fishing season and gear regulations in the 1870s. Their regulations were not always consistent, however. After a federal court ruled in 1895 that someone fishing legally under Washington law on the Washington side could not be prosecuted for violating an Oregon closure, it became clear that conservation was possible only if the two states had similar laws that could be enforced on both sides of the river. *In re Mattson*, 69 F. 535 (C.C.D. Or. 1895); *see generally* Elmer Wollenberg, *The Columbia River Fish Compact*, 18 OR. L. REV. 88, 91-94 (1939).

Delegates from the legislatures of Oregon and Washington began working together on a uniform fisheries code for the Columbia River, and the two legislatures began attempting to adopt parallel fishing regulations. They set up a Joint Committee to review fishing regulations and recommend changes for the legislatures to enact the next time they were in session. *E.g.*, S.J. Res. 4, 12<sup>th</sup> Leg. (Wash. 1911).

In 1915, a Joint Committee of legislators from both states reported to the Oregon and Washington Legislatures “concerning legislation, with reference to the fishing industry in the waters and streams over which [Washington and Oregon] have concurrent rights and jurisdiction.” Senate Journal, 14<sup>th</sup> Leg. 316 (Wash. 1915). The Joint Committee recommended adoption of a package of new laws, and the retention of others. *Id.* at 316-20. Finally, the Joint Committee recommended that the two states adopt a compact, to be submitted to Congress for ratification, that would allow Columbia River fish laws to be modified “only by joint agreement of said states.” *Id.* at 320.

## **B. Adoption of the Columbia River Compact**

### **1. Washington**

In 1915, the Washington Legislature adopted the Columbia River Compact as part of a bill that reorganized and brought together all laws pertaining to food fish and shellfish into a single, comprehensive Fisheries Code. 1915 Wash. Laws ch. 31. Among other things, the Fisheries Code enacted most of the recommendations of the Joint Committee. Section 116 of the 1915 Fisheries Code contained the Columbia River Compact:

Should Congress, by virtue of the authority vested in it under section 10, article 1, of the constitution of the United States, providing for compacts and agreements between states, ratify the recommendations of the conference committees of the States of Washington and Oregon, appointed to agree on legislation necessary for the regulation, preservation and protection of fish in the waters of the Columbia river, or its tributaries, over which said states have concurrent jurisdiction, said recommendation being as follows: “We further recommend that a resolution be passed by the legislatures of Washington and Oregon, whereby the ratification by Congress of the laws of the States of Washington and Oregon shall act as a treaty between said states, subject to modification only by joint agreement by said states;” and said recommendation having been approved by resolution adopting the report of the conference committee, then, and in that event, there shall exist between the States of Washington and Oregon a definite compact and agreement, the purport of which shall be substantially as follows: “All laws and regulations now existing or which may be necessary for regulating, protecting or preserving fish in the waters of the Columbia river, or its tributaries, over which the States of Washington and Oregon have concurrent jurisdiction, or which would be affected by said concurrent jurisdiction, shall be made, changed, altered

and amended in whole or in part, only with the mutual consent and approbation of both states.”

1915 Wash. Laws ch. 31, § 116 (codified as amended at Wash. Rev. Code § 77.75.010 (2008)).

## **2. Oregon**

In Chapter 188 of the 1915 Oregon session laws, the Oregon Legislature also adopted the recommendations of the Joint Committee. Section 20, which was nearly identical to Section 116 of the 1915 Washington Fisheries Code, contained the Columbia River Compact. It survives unchanged today as Section 507.010 of the Oregon Revised Statutes.

## **3. Congress**

Because the United States Constitution forbids states from entering into compacts without the consent of Congress,<sup>2</sup> Oregon and Washington asked Congress to approve the Columbia River Compact, which it did in 1918.

As adopted by Congress, the Columbia River Compact provides in its entirety as follows:

All laws and regulations now existing [as of 1915], or which may be necessary for regulating, protecting, or preserving fish in the waters of the Columbia River, over which the States of Oregon and Washington have concurrent jurisdiction, or any other waters within either of said States, which would affect said concurrent jurisdiction, shall be made, changed, altered, and amended in whole or in part, only with the mutual consent and approbation of both States.

Act of April 8, 1918, ch. 47, 40 Stat. 515.

## **C. Where Does the Columbia River Compact Apply?**

The Columbia River Compact says it applies to “any . . . waters” in Oregon and Washington “which would affect” their concurrent jurisdiction. Potentially that could include the entire Oregon and Washington portions of the Columbia River Basin. *See* Wollenberg, 18 OR. L. REV. at 97. By legislation and custom, however, the states have interpreted “any . . . waters” much more narrowly.

By legislation, Oregon and Washington have specified that the waters subject to the two states’ concurrent jurisdiction are those that coincide with the states’ boundaries,

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<sup>2</sup> The Compacts Clause of the United States Constitution provides: “No state shall, without the consent of congress, . . . enter into any agreement or compact with another state . . .” U.S. Const. art. I, § 10, ¶ 3.

effectively the Columbia River mainstem from its mouth to the Wallula Gap. 1915 Or. Laws ch. 188, § 1 (codified at Or. Rev. Stat. § 507.020); 1983 Wash. Laws 1<sup>st</sup> ex. sess. ch. 46, §§ 4(9), 150 (codified as amended at Wash. Rev. Code §§ 77.08.010(37), 77.75.020). By custom, the states have applied the Columbia River Compact only to those waters, and not even to all of them. Semi-enclosed pockets of water along the Columbia River, such as Blind Slough in Oregon, are considered to be interior state waters not subject to concurrent jurisdiction or the Columbia River Compact. In practice, however, the states consult with each other when they regulate fishing in those areas.<sup>3</sup>

#### **D. What Are the “All Laws” to Which the Columbia River Compact Refers?**

The Columbia River Compact says it applies to “all laws” necessary to protect “fish” in the Columbia River. As it has been interpreted, however, “all” does not mean “all,” and “fish” does not mean “fish.”

When Congress enacted the Columbia River Compact, it specifically excluded from the Compact’s application laws “affect[ing] the right of the United States to regulate commerce, or the jurisdiction of the United States over navigable waters.” 40 Stat. at 515. So, the Columbia River Compact does not give the states of Oregon and Washington a right to veto federal navigation projects in the Columbia River Basin. And we can assume that “all” laws means only state laws, because in 1915 the American legal system recognized no other sovereign as having authority to regulate fish conservation in state waters. *See* Wollenberg, 18 OR. L. REV. at 88-90. Courts and customs have read other limitations into the Compact language, as well.

##### **1. Frozen in Time at 1915?**

The legislative history of the Columbia River Compact suggests that the drafters had an expansive view of what “all laws” meant, including license qualifications and even bounties for seal scalps. *See* Senate Journal, 14<sup>th</sup> Leg. 316-20 (Wash. 1915); Wollenberg, 18 OR. L. REV. at 94-95 & n.39. Such a broad interpretation quickly proved inconvenient, however.

In 1919, Oregon enacted a law providing that only United States citizens could hold fishing licenses. Washington did not enact a similar law and did not consent to Oregon’s. Charles Olin, a Russian native, challenged the Oregon law as contrary to the Columbia

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<sup>3</sup> The practical effect of some areas being regarded as interior state waters is that people can lawfully fish there only with the license of that state. *See* Or. Admin. R. § 635-042-0160(3) (Blind Slough). In waters deemed “concurrent,” either state’s license is recognized as valid. Wash. Rev. Code § 77.32.410 (personal use licenses); 1915 Wash. Laws ch. 31, § 51 ¶ 38 (codified as amended at Wash. Rev. Code § 77.65.010(3)) (commercial licenses); Wash. Admin. Code § 220-55-210 (personal use licenses); Wash. Admin. Code § 220-20-005(1) (commercial salmon gillnet licenses); *see* Or. Rev. Stat. § 497.014 (personal use licenses); 1915 Or. Laws ch. 188, § 5 (codified as amended at Or. Rev. Stat. § 508.460) (commercial salmon gillnet licenses); Or. Admin. R. § 635-023-0085 (personal use licenses). Indians exercising treaty fishing rights do not need a state license. *Tulee v. Washington*, 315 U.S. 681 (1942).

River Compact. The courts rejected his challenge, holding that either state could narrow the class of persons entitled to hold a fishing license without running afoul of the Compact. *Olin v. Kitzmiller*, 259 U.S. 260 (1922), *aff'g* 268 F. 348 (9<sup>th</sup> Cir. 1920).

The Ninth Circuit in *Olin* had limited its holding to license laws, suggesting in dictum that neither state could change fishing season and gear regulations unilaterally. *Olin v. Kitzmiller*, 268 F. 348, 349 (9<sup>th</sup> Cir. 1920). Later court decisions ignored that, however, upholding citizens' initiatives that banned certain types of fishing gear in only one state. *P.J. McGowan & Sons, Inc. v. Van Winkle*, 21 F.2d 76 (D. Or. 1927) (Oregon initiative banning fish wheels and beach seines did not violate Columbia River Compact), *cert. denied*, 277 U.S. 574 (1928); *State ex rel. Gile v. Huse*, 183 Wash. 560, 49 P.2d 25 (1935) (Initiative 77, which banned fish traps and wheels in Washington, did not violate Columbia River Compact). *See also Anthony v. Veatch*, 189 Or. 462, 220 P.2d 493 (1950), *cert. denied*, 340 U.S. 923 (1951) (Oregon initiative banning fish traps did not violate Columbia River Compact). According to these decisions, the Compact bars the states only from enacting laws that are more permissive than the package they jointly adopted in 1915. Each state is free to enact laws that are more restrictive without the consent of the other. *McGowan*, 21 F.2d at 77; *Nw. Gillnetters Ass'n v. Sandison*, 95 Wash.2d 638, 646, 628 P.2d 800, 804 (1981); *Svenson*, 104 Wash.2d at 541, 707 P.2d at 124.

To me, that interpretation makes no sense. It defeats the purpose of the Columbia River Compact. Conditions in the Columbia River today are vastly from those of 1915, and little remains intact from the laws that Oregon and Washington enacted that year to implement the Columbia River Compact. Conservation is possible only if the two states' regulations change together through time. Fortunately, the states of Oregon and Washington have taken a practical approach.

## **2. Commercial Versus Personal Use Fisheries**

By custom, Oregon and Washington have applied the Columbia River Compact only to commercial fisheries. In my opinion, the Compact contains no such limitation.<sup>4</sup> The legislative history of the Columbia River Compact does suggest that the Compact applies only to "food fish," however. Thus, in my opinion, the proper distinction is between "food fish" and "game fish," not "commercial" and other fisheries.

When Washington enacted the Columbia River Compact in 1915, it was part of a comprehensive code governing people's conduct with respect to "food fish." 1915 Wash. Laws ch. 31, § 120; *see also* 1937 Wash. Laws. ch. 123 (director of fisheries' authority respecting Columbia River Compact applies to "food fish"). Under state law, "food fish" have traditionally been shared between commercial and personal use (subsistence and recreational) fisheries. *See* Or. Rev. Stat. § 506.109. Washington's 1915 enactment specifically excluded "game fish," which state law has traditionally reserved exclusively for personal use fisheries. 1915 Wash. Laws ch. 31, § 120. The Oregon law that adopted

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<sup>4</sup> My opinion is contrary to an official opinion of the Oregon Attorney General's Office. 45 OR. ATT'Y GEN. OP. 137, 138, 157-59 (No. 8182) (Nov. 13, 1986).

the Columbia River Compact also focused on “food fish,” though it did not specifically exclude “game fish.” 1915 Or. Laws ch. 188.

As a practical matter, Oregon and Washington today do work together in adopting regulations for non-commercial fisheries. So, whether the Columbia River Compact applies to them or not, the two states behave as if it does.

### **3. Maybe Not Habitat Protection Laws?**

As far as I can tell, Oregon and Washington have applied the Columbia River Compact only to laws about fishing, and not to laws about fish habitat protection. “All laws” for “protecting or preserving fish” would seem broad enough to encompass habitat protection laws. Are state forest practices laws and water quality standards subject to the Columbia River Compact, for example? Some have asked why not. *See* Timothy Weaver, *Litigation and Negotiation: The History of Salmon in the Columbia River Basin*, 24 *ECOLOGY L.Q.* 677, 679 (1997).

In my opinion, the drafters of the Columbia River Compact were not thinking about habitat. They were thinking about fishing. The 1915 recommendations of the bi-state Joint Committee do not mention habitat protection. Senate Journal, 14<sup>th</sup> Leg. 316-20 (Wash. 1915). The “all laws” then existing for the protection of fish did include habitat protection laws, however. For example, the same legislation that enacted the Columbia River Compact in Washington also reenacted and amended a law requiring fish passage at stream obstructions. 1915 Wash. Laws ch. 31, § 78 (codified as amended at Wash. Rev. Code § 77.57.030). *See also id.* § 77 (requiring fish screens in ditches, codified as amended at Wash. Rev. Code § 77.57.010); § 82 (prohibiting water pollution, superseded by 1945 Wash. Laws ch. 216, repealed 1949 Wash. Laws ch. 112, p. 304).

It may be possible to construe the Columbia River Compact as applying to habitat protection laws. In my view, that is not what the drafters intended, however.

### **E. How Does the Columbia River Compact Fit With Indian Treaties?**

#### **1. *United States v. Oregon***

During the 1850s, the United States government executed four treaties with Indian Tribes whose traditional fishing grounds include sites along the Columbia River where it now forms the boundary between the States of Oregon and Washington. The treaties secure to the signatory Tribes:

[T]he right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing . . . .

Treaty With the Yakamas, art. III, ¶ 2, 12 Stat. 951, 953 (June 9, 1855); Treaty With the Nez Percés, art. III, ¶ 2, 12 Stat. 957, 958 (June 11, 1855); *see* Treaty With the Walla-



Wallas (Umatilla Treaty), art. I, 12 Stat. 945, 946 (June 9, 1855); Treaty With Indians in Middle Oregon (Warm Springs Treaty), art. I, 12 Stat. 963, 964 (June 25, 1855).

When the Treaties were executed, nobody foresaw the need for the regulation of fishing, and the Treaties say nothing about states. By the end of the nineteenth century, state officials began asking whether newly-enacted state fisheries laws applied to treaty Indians fishing at “usual and accustomed places.” State attorneys said yes. Indians said no. Whether and to what extent the Treaties, being federal laws, preempt state regulation of fishing by treaty Indians,<sup>5</sup> became a contentious issue that consumed advocates on both sides for much of the twentieth century.<sup>6</sup>

Among other things, state attorneys argued that, even if the treaties had once preempted state law to some extent, the Columbia River Compact, being a later-enacted federal law, altered or abrogated treaty fishing rights. The courts rejected that argument, holding that the Compact had no effect on treaty fishing rights. *Sohappy v. Smith*, 302 F Supp. 899, 912 (D. Or. 1969); *State v. James*, 72 Wash.2d 746, 753-54, 435 P.2d 521 (1967).

Ultimately, the United States Supreme Court held in the spring of 1968 that the Treaties preempt *some* state laws as applied to treaty Indians, those that are discriminatory and not necessary for conservation. *Puyallup Tribe v. Wash. Game Dep't*, 391 U.S. 392 (1968). That summer, tribal advocates filed *Sohappy v. Smith/United States v. Oregon* to establish what Oregon and Washington<sup>7</sup> must do to regulate in a way that is nondiscriminatory and “necessary for the conservation of the fish.” In 1969, the court issued a declaratory judgment that outlined the parameters for state regulation of fishing by treaty Indians under the Columbia River Compact. *United States v. Oregon*, Civil No. 68-513, Judgment at 2-3 (D. Or. Oct. 10, 1969). These standards continue to govern actions that Oregon and Washington take under the Columbia River Compact today.

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<sup>5</sup> The Supremacy Clause of the United States Constitution provides: “This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.” U.S. CONST. art. VI, cl. 2.

<sup>6</sup> See generally Fronda Woods, *Who's In Charge of Fishing?*, 106 OREGON HISTORICAL QUARTERLY 412 (Fall 2005), <http://www.historycooperative.org/journals/ohq/106.3/woods.html>.

<sup>7</sup> The *Sohappy* plaintiffs, but not the United States, named Washington officials as defendants in their complaint. Washington officials were soon dropped from the case. *Sohappy v. Smith*, Civil No. 68-409, Notice of Dismissal (D. Or. Nov. 8, 1968). In 1974, however, Washington moved for and was granted intervention in *U.S. v. Oregon. United States v. Oregon*, Civil No. 68-513, Order Granting Leave to Intervene (D. Or. April 29, 1974). Today, Washington remains a full participant in *United States v. Oregon*, over which the court retains continuing jurisdiction. The court terminated continuing jurisdiction over *Sohappy v. Smith* in an order dated June 27, 1978.

## **2. Relationship Between Tribal and State Laws**

In its 1969 memorandum decision, the court in *Sohappy v. Smith/United States v. Oregon* suggested that the Tribes have authority to regulate fishing by their members. *Sohappy v. Smith*, 302 F. Supp. 899, 912 (D. Or. 1969). The Ninth Circuit confirmed it in 1974. *Settler v. Lameer*, 507 F.2d 231 (9<sup>th</sup> Cir. 1974). Thus, in some respects, the states and the Tribes have overlapping, concurrent authority to regulate fishing by tribal members exercising treaty rights. *United States v. Washington*, 520 F.2d 676, 686-87 n.4 (9<sup>th</sup> Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

Just as it does not work for Oregon and Washington to have inconsistent regulations, so does it not work for the States and the Tribes to have inconsistent regulations. The court in *U.S. v. Oregon* has admonished the parties to cooperate and not to act unilaterally in managing their Columbia River fisheries. *Sohappy*, 302 F. Supp. at 912; *United States v. Oregon*, Civil No. 68-513, Order Dissolving Temporary Restraining Order at 4 (D. Or. May 8, 1974); *United States v. Oregon*, Civil No. 68-513, Stipulated Order Regarding the Imnaha Steelhead Dispute (D. Or. Apr. 16, 1998).

The framework for *United States v. Oregon* fisheries is developed through negotiations under the federal court's supervision. Over the years, the court has approved a series of agreements. The 2008-2017 *United States v. Oregon* Management Agreement, which the court approved in August 2008, is available online at the CRITFC web site, <http://www.critfc.org/>. The *United States v. Oregon* agreements have recognized the need for compatible state and tribal regulations for treaty Indian fisheries.<sup>8</sup> In Part I.C of the 2008-2017 *United States v. Oregon* Management Agreement, the parties have agreed to set up a Regulatory Coordination Committee to monitor regulations for consistency.

## **3. Relationship Between *United States v. Oregon* and *United States v. Washington***

*United States v. Washington*, a lawsuit that involves issues similar to those in *United States v. Oregon*, was filed in 1970 in the United States District Court for the Western District of Washington. It concerns the treaty fishing rights of Indian Tribes in the Puget Sound region and the Washington coastal region from Grays Harbor northward. This area is called the *United States v. Washington* "case area."<sup>9</sup> *United States v. Washington* went to trial in 1973, resulting in a famous decision six months later that is commonly known as the "Boldt decision." *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9<sup>th</sup> Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). The court retains continuing jurisdiction to implement the 1974 decree. 384 F. Supp. at 408.

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<sup>8</sup> See 1988 Columbia River Fish Management Plan, Part IV.E. The court adopted the 1988 CRFMP as an order of the court in *United States v. Oregon*, 699 F. Supp. 1456 (D. Or. 1988), *aff'd*, 913 F.2d 576 (9<sup>th</sup> Cir. 1990). The 1988 CRFMP is available online at the Columbia River Intertribal Fish Commission web site, <http://www.critfc.org/legal/crfmp88.html>.

<sup>9</sup> *United States v. Washington*, 384 F. Supp. 312, 328 (W.D. Wash. 1974); *see id.* at 400 (CL 7), 406 (Definition 9). The court added the Grays Harbor watershed to the case area in *United States v. Washington*, 459 F. Supp. 1020, 1097 (W.D. Wash. 1977).

The Yakama Nation, one of the Tribes involved in *United States v. Oregon*, also has treaty fishing rights within the *United States v. Washington* case area and is a party in that litigation. See 384 F. Supp. at 379-82. As part of its 1974 equitable decree, the court in *United States v. Washington* enjoined the State of Washington from regulating fishing by members of “self-regulating” tribes at usual and accustomed places within the *United States v. Washington* case area. *U.S. v. Washington*, 384 F. Supp. at 414, *aff’d*, 520 F.2d at 686 & n.4. The court determined that the Yakama and Quinault Nations qualified as self-regulating tribes. 384 F. Supp. at 332, 340-42.<sup>10</sup>

A few weeks after Judge Boldt issued his decree in *United States v. Washington*, Washington’s attorney asked Judge Boldt for confirmation that the Columbia River, being under the District of Oregon’s jurisdiction in *Sohappy v. Smith/United States v. Oregon*, was outside the “case area” to which the *United States v. Washington* injunction applied. Judge Boldt provided the requested confirmation in a memorandum to the *United States v. Washington* attorneys.<sup>11</sup>

The Columbia River Treaty Tribes have reserved the right to seek self-regulatory status from the court in *United States v. Oregon* at some time in the future. 1988 Columbia River Fish Management Plan § IV.E.6, Page 62. At this time, however, the Tribes and the State of Oregon and Washington jointly regulate fishing by treaty tribal members in the Columbia River, as they have done successfully for 40 years.

Hearings under the Columbia River Compact provide the forum where the *U.S. v. Oregon* parties cooperate in working out the details of state and tribal fishing regulations for the Columbia River in-season. In my opinion, it is a good process that works well.

#### **F. Procedures for Adopting Regulations Under the Columbia River Compact**

The Columbia River Compact does not specify any particular procedure for adopting laws for protecting fish, so long as they are adopted “with the mutual consent and approbation of both States.” 40 Stat. at 515. Over the past century, the customs and laws that govern the states’ interactions have evolved. Today, one person from each state’s fish and wildlife administrative agency (the “Compact agencies”) represents that state in most negotiations under the Columbia River Compact. Sometimes, people call those two persons the “Columbia River Compact.” Legally, however, there is no rule-making entity, administrative body, or process called the “Columbia River Compact.”

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<sup>10</sup> The Washington Department of Fish and Wildlife recognized the Quileute Tribe as a “self-regulating” tribe in 1998, in settlement of *United States v. Washington* Subproceeding 94-1.

<sup>11</sup> Judge Boldt’s April 24, 1974 memorandum was filed with the court in *United States v. Oregon* on April 29, 1974 as an attachment to the Affidavit of James M. Johnson.

## 1. Who Has Authority To Implement the Columbia River Compact?

When the Columbia River Compact was adopted in 1915, time, place, and manner regulations for fishing were put in place through enactments by the state legislatures. That was a cumbersome, inflexible system. In 1921, the Washington Legislature created a state fisheries board and authorized it to adopt and amend rules governing seasons, areas, and gear for the taking of food fish. Laws of 1921, ch. 7, § 110; *see Vail v. Seaborg*, 120 Wash. 126, 207 P. 15 (1922) (upholding 1921 law as constitutional). In 1937, the Washington Legislature conferred on the Director of Fisheries the authority to work with Oregon to change fishing seasons under the Columbia River Compact. 1937 Wash. Laws ch. 123, § 2 (expanded by 1983 Wash. Laws 1<sup>st</sup> ex. sess. Ch. 46, § 150, codified as amended at Wash. Rev. Code § 77.75.020); *see* 1935-36 WASH. ATT'Y GEN. OP. 200 (identifying the problem corrected by the 1937 legislation). Today, that authority is exercised through the Washington Fish and Wildlife Commission, which has generally delegated it to the Director of Fish and Wildlife. Wash. Rev. Code § 77.75.020.

In Oregon, the 1937 Legislature authorized the Oregon Fish Commission, now the Oregon Fish and Wildlife Commission, to work with Washington to change fishing regulations under the Columbia River Compact. 1937 Or. Laws chs. 15, 286 (codified as amended at Or. Rev. Stat. § 507.030). The Oregon Director of Fish and Wildlife has emergency authority to adopt temporary rules, subject to the Commission's approval. Or. Rev. Stat. § 496.118(6).

In both states, the legislature retains the final say under the Columbia River Compact.

## 2. Current Rule Making Process

Today, a mix of statutes, court orders, policies, and customs guides implementation of the Columbia River Compact. In my opinion, it works remarkably well.

	Oregon	Washington
Who may represent the state?	OR Fish & Wildlife Comm'n, ORS 507.030(1). Fish & Wildlife Director has emergency authority per ORS 496.118(6). Director designates ODFW staff to represent him.	WA Fish & Wildlife Comm'n, RCW 77.75.020. Delegated to Fish & Wildlife Director per RCW 77.04.080 and July 1, 1996 Johnson to Shanks Memo. Director designates WDFW staff to represent him.
Must negotiations occur in a public hearing?	Optional for non-treaty fisheries, ORS 507.030(2).	No for non-treaty fisheries. <i>See Salmon For All v. Dep't of Fisheries</i> , 118 Wash.2d 270, 821 P.2d 1211 (1992).
	Yes for treaty Indian fisheries. <i>U.S. v. Oregon</i> , Civil No. 68-513, Judgment (D. Or. Oct. 10, 1969).	

	Oregon	Washington
If so, where may the hearing be held?	In OR or WA w/in 25 miles of Col. R. where commercial fishing is permitted, ORS 507.030(2).	N/A
How is notice of the hearing conveyed to the public?	ODFW web site <a href="http://www.dfw.state.or.us/fish/OSCRP/CRM/index.asp">http://www.dfw.state.or.us/fish/OSCRP/CRM/index.asp</a> , phone hotline (971) 673-6000.	WDFW web site <a href="http://wdfw.wa.gov/fish/crc/crcindex.htm">http://wdfw.wa.gov/fish/crc/crcindex.htm</a> , telephone hotline (360) 902-2500.
What procedures apply at the hearing?	No law governs the hearing procedures. By custom, the following occurs: (1) State representatives introduce themselves and the issue before them. (2) Technical staff from ODFW and WDFW and/or the <i>U.S. v. Oregon</i> Technical Advisory Committee present a joint report on the data available that bear on the issue and may present technical recommendations. (3) Testimony is taken from (a) Columbia River Treaty Tribes, (b) Shoshone-Bannock Tribes, (c) Colville Tribes, (d) Idaho Dep't of Fish & Game, (e) National Marine Fisheries Service, (f) U.S. Fish & Wildlife Service, and (g) the public. (4) State representatives discuss the issue. (5) State reps vote and announce their agreement or lack thereof.	
Do the states keep a record of the hearing?	Yes, though no law requires that a record be kept. By custom, ODFW has taped the hearings so that there will be a record for the court if necessary. ODFW/WDFW technical reports and fact sheets considered at the hearings are available online at <a href="http://www.dfw.state.or.us/fish/OSCRP/CRM/index.asp">http://www.dfw.state.or.us/fish/OSCRP/CRM/index.asp</a> and <a href="http://wdfw.wa.gov/fish/crc/crcindex.htm">http://wdfw.wa.gov/fish/crc/crcindex.htm</a> .	
How do the states decide how to allocate fishing opportunity between treaty and non-treaty fisheries?	The parties to <i>United States v. Oregon</i> negotiate agreements under federal court supervision. The 2008-2017 <i>United States v. Oregon</i> Management Agreement is posted on the Columbia River Intertribal Fish Commission web site, <a href="http://www.critfc.org/">http://www.critfc.org/</a>	
How do the states decide how to allocate the non-treaty fishing opportunity between sectors or "user groups?"	Oregon Fish & Wildlife Commission provides negotiating direction to ODFW staff at public meetings.	Washington Fish & Wildlife Commission policies adopted at public meetings, after consultation with advisory groups. Policies are online at <a href="http://wdfw.wa.gov/com/policies.htm">http://wdfw.wa.gov/com/policies.htm</a> . See also <i>Nw. Gillnetters Ass'n v. Sandison</i> , 95 Wash.2d 638, 628 P.2d 800 (1981).

	Oregon	Washington
Are there additional procedural requirements for treaty Indian fishing rules?	Treaty Indian Tribes and their members are entitled “to be given appropriate notice and opportunity to participate meaningfully in the rule-making process.” <i>Sohappy v. Smith</i> , 302 F. Supp. 899, 912 (D. Or. 1969). The 1969 Judgment in <i>U.S. v. Oregon</i> requires “hearings preliminary to regulation” and certain findings. This is usually done through hearings conducted under ORS 507.030. In the 1988 Columbia River Fish Management Plan, the <i>U.S. v. Oregon</i> parties recognized the need for compatible state and tribal regulations for treaty Indian fisheries. Online at <a href="http://www.critfc.org/legal/crfmp88.html">http://www.critfc.org/legal/crfmp88.html</a>	
If the two states reach consensus, how are the agreements implemented?	ODFW rules or enactments by Oregon legislature.	WA Fish & Wildlife Commission rules (RCW 77.12.045), or enactments by Wash. Legislature. F&W Commission has delegated to F&W Director authority to adopt emergency rules per RCW 77.04.080 and July 1, 1996 Johnson to Shanks Memo.
If implemented by rule, what rule-making procedures apply?	Oregon Administrative Procedures Act, ORS ch. 183; ORS 496.138.	Washington Administrative Procedure Act, RCW ch. 34.05. Materials considered at the ORS 507.030 hearing become part of the rule-making file per RCW 34.05.370.
Do the rule-making procedures include a public hearing?	Yes for permanent rules, ORS 496.138(3). No for temporary rules, ORS 183.335(5), though public hearings under ORS 507.030 usually do occur before ODFW adopts temporary rules.	Yes for permanent rules, RCW 34.05.325. No for emergency rules, RCW 34.05.350, though public hearings under ORS 507.030 usually do occur before WDFW adopts emergency rules.
How does the public get notice of the rules?	ODFW web site <a href="http://www.dfw.state.or.us/fish/OSCRP/CRM/index.asp">http://www.dfw.state.or.us/fish/OSCRP/CRM/index.asp</a> ; telephone hotline (971) 673-6000; mailings to interested persons and Associated Press, OAR 635-001-0010. Eventual publication in Oregon Bulletin <a href="http://arcweb.sos.state.or.us/banners/rules.htm">http://arcweb.sos.state.or.us/banners/rules.htm</a>	WDFW web site <a href="http://wdfw.wa.gov/fish/crc/crcindex.htm">http://wdfw.wa.gov/fish/crc/crcindex.htm</a> , telephone hotline (360) 902-2500. Eventual publication in Washington State Register <a href="http://www1.leg.wa.gov/CodeReviser/Washington+State+Register/">http://www1.leg.wa.gov/CodeReviser/Washington+State+Register/</a>